Supreme Court, U.S.
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No. 97-1870

In The

Supreme Court of the United States

October Term, 1997

MAURO, ESTATE OF WILLIAM,

Petitioner,

vs.

BORGESS MEDICAL CENTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the United States Supreme Court grant a petition for writ of certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit where the decision is consistent with decisions of courts of appeal from other circuits and does not decide any important question of federal law?

2. Should the United States Supreme Court grant a petition for writ of certiorari to consider adopting a definition of "direct threat" under the Americans With Disabilities Act which is incapable of being applied to even undisputed facts and entirely dependent upon the subjective view of a jury where the Court of Appeals declined to adopt that definition and no other court has adopted that definition?

LIST OF PARTIES

Respondent concurs with petitioner's list of parties.

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School Board v. Arline, 480 U.S. 273 (1987) 1

United States Constitution Cited:

Fifth Amendment 1

Rules Cited:

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STATUTORY PROVISIONS

Respondent concurs with petitioner's list of statutory provisions, except that if petitioner's proposed definition of "direct threat" were adopted, it would implicate the due process clause of the Fifth Amendment to the United States Constitution which states in pertinent part that "No person shall . . . be deprived of . . . property, without due process of law. . . ."

COUNTER-STATEMENT OF CASE

Respondent Borgess Medical Center ("Borgess") notes the following misstatements in the petition for writ of certiorari. The District Court and the Court of Appeals did *not* rule that no matter how remote the probability of the threat and risk, if its outcome is fatal, a "direct threat" and "significant risk" exist as a matter of law. Rather, "after inquiry into the specific facts concerning Mauro's duties," *Mauro v. Borgess Medical Center*, 137 F.3d 398, 407 (6th Cir. 1998), the United States Court of Appeals for the Sixth Circuit held that a "direct threat" was present. The Court of Appeals weighed all four factors of the *School Board v. Arline*, 480 U.S. 273, 287-288 (1987) test in reaching its conclusion, noting:

> The parties agree that the first three factors of the Arline test: the nature, duration and severity of the risk, all indicate that Mauro posed a significant risk to others. Mauro argues, however, that because the probability of transmission, the fourth factor of Arline, was so slight, it overwhelmed the first three factors and created a genuine issue of material fact.

(137 F.3d at 403)

The Court of Appeals rejected Mauro's argument that the probability of transmission was so "remote" as to overwhelm the first three factors by carefully examining the record which demonstrated that:

1. Contrary to the statement in petitioner's application, Mr. Mauro had been tested and found to be HIV positive.

2. Mr. Mauro was employed as a surgical technician.

3. The Center for Disease Control ("CDC") recommended that hospitals identify which procedures are exposure prone and not allow HIV infected health care workers to perform those procedures unless they sought counsel from an expert review panel and had been advised under what circumstances they may continue to perform the procedures.

4. Courts are to defer to the medical judgment expressed in the Report of The CDC in evaluating the District Court's ruling.

5. Borgess appointed an expert review panel as recommended by the CDC, calling it the "Ad Hoc HIV Task Force."

6. Sharon Hickman, the interim director of operating rooms at Borgess explained to the Ad Hoc HIV Task Force that a surgical technician is occasionally required to assist in the performance of surgery by holding back body tissue with either retractors or the surgeon in visualizing the operative site. A surgical technician may also assist with suturing.

7. Dr. Stephen Ross, an infectious disease specialist, explained that the Ad Hoc HIV Task Force concluded that because the job responsibilities of a surgical technician require

the worker to occasionally place his or her hands in the body cavity in close proximity of sharp instrumentation where visualization of the operative site is poor, patient care and safety would be at risk if the technician was infected with HIV.

8. Mauro admitted that he placed his hands in proximity of the surgical wound in the presence of sharp instrumentation.

9. Mauro admitted that in the past he had been cut by a surgical knife and scratched by a dirty needle.

10. Mauro was offered an alternative position and the offer letter explained that the alternative position was necessary because an essential function of the O.R. surgical technician position is the ability to enter a patient's wound during surgery as directed by the attending surgeon.

Petitioner argues that his infectious disease specialist, Dr. Davenport, testified that the risk of his transmitting the virus was remote. However, Dr. Davenport also testified:

> Q. . . . Do you agree that if a job requires an HIV infected worker to place his or her hands into a patient's body cavity in the presence of sharp instrumentation it represents a direct threat to patient care and safety?
>
> A. At that point it represents a risk, a real risk, to the patient care and safety.

(R46, Exhibit G, pp. 75-76).

CONCISE ARGUMENT

I.

THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION IS CONSISTENT WITH OTHER COURTS WHICH HAVE FACED SIMILAR ISSUES.

Rule 10a of the Supreme Court Rules states in pertinent part one of the reasons for the Court to grant a petition for writ of certiorari is if:

> a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. . . .

That rule weighs against granting the writ. As petitioner acknowledges, the Fourth and Fifth Circuit Courts of Appeals have reached similar conclusions in *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995) and *Bradley v. University of Texas MD Anderson Cancer Center*, 3 F.3d 922 (5th Cir. 1993). As a result, there is no conflict between the circuits which requires resolution by this Court.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION DOES NOT DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW.

Rule 10(c) of the Supreme Court Rules says that another reason for granting a petition for writ of certiorari is in pertinent part:

> . . . United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Again, this factor favors denying the petition. The Court of Appeals did not decide a question of federal law. It simply applied the law to the undisputed facts in the case.

Moreover, it applied the law in a manner consistent with the Court's recent decision in *Bragdon v. Abbott, et al.*, No. 97-156 (S. Ct. 6/25/98), *slip op.* at 14, where this Court held:

> Our conclusion that courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments does not answer the implicit assumption in the question presented, whether petitioner's actions were reasonable in light of the available medical evidence. In assessing the reasonableness of petitioner's actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority. *Arline, supra,* at 288; 28 CFT pt. 36, App. B, p. 626 (1997). The views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm. *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 32, p. 187 (5th ed. 1984).

In this case, Borgess complied with the CDC guidelines. It appointed a medical task force which relied on CDC authority and concluded that petitioner was a direct threat because a surgical technician must perform exposure prone activities. Petitioner did not cite any health care professional who disagreed with the medical consensus, nor did he cite a credible scientific basis for concluding that surgical technician activities do not represent a direct threat. As a result, there is no reason to grant the petition.

III.

IF THE COURTS CANNOT DETERMINE WHETHER PETITIONER WAS A DIRECT THREAT WHERE, AS IN THIS CASE, THE FACTS ARE UNDISPUTED, THEN THE "DIRECT THREAT" STANDARD IS UNCONSTITUTIONALLY VOID FOR VAGUENESS.

As is evident from petitioner's writ, there are no disputed facts in this case. The parties agree on Mr. Mauro's job activities and agree that HIV: (1) can be transmitted by blood to blood contact; (2) remains transmittable from the point of infection throughout the remainder of the life of the infected person; and (3) is uniformly lethal. The parties also generally agree on the statistical likelihood that the virus will be transmitted by a surgical technician during a surgical procedure. The disagreement arises from the application of the law to the undisputed facts of this case.

Petitioner argues that even though the facts are undisputed, the statutory definition of "direct threat" is so subjective that it should be considered an issue of fact rather than law. (Petition for Writ of Certiorari at 24) Borgess respectfully submits that if the Courts (and a party seeking to comply with the law) cannot determine whether a disease represents a "direct threat" even

when all the facts surrounding the four factor "direct threat" analysis are known, then the law is unconstitutionally void for vagueness. A party could not determine if it had complied with the law until a jury has been empaneled and delivered its "subjective judgment." If that were true, the law is so fundamentally unfair as to deprive a party of due process and is void for vagueness.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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